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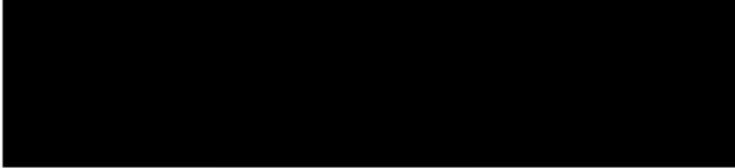
U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



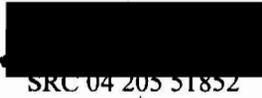
U.S. Citizenship
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FILE:



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Office: TEXAS SERVICE CENTER

Date: DEC 19 2006

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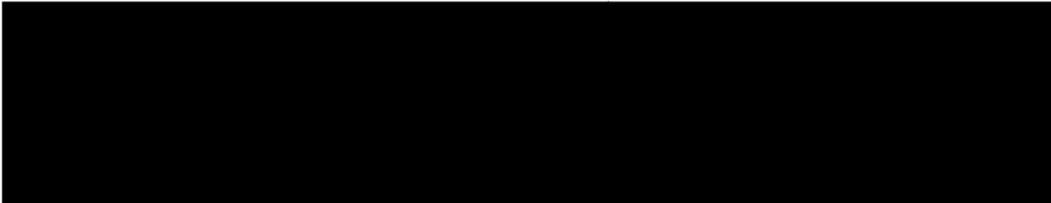
Petitioner:

Beneficiary:



PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

A handwritten signature in cursive script, appearing to read "R. Wiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The petitioner is a hurricane protection business.¹ It seeks to employ the beneficiary permanently in the United States as a marketing representative. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor. The director determined that the petitioner had not established its ability to pay the proffered wage based on the evidence submitted to the record and the petitioner had not established that the beneficiary is qualified to perform the duties of the proffered position with four years of qualifying employment experience. The director denied the petition accordingly.

The record shows that the appeal is properly filed and timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's April 28, 2005 denial, the two issues in case are whether or not the petitioner has established its ability to pay the proffered wage and whether the petitioner demonstrated that the beneficiary is qualified to perform the duties of the proffered position.²

The AAO takes a *de novo* look at issues raised in the denial of this petition. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal³. In these proceedings, the AAO will consider whether the petitioner established its ability to pay the proffered wage as of the priority date and to the present, and then will consider whether the petitioner established that the beneficiary is qualified to perform the duties of the position.

The regulation 8 C.F.R. § 204.5(g)(2) states in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

¹ The petitioner further explains its business operations in a letter of support as a manufacturer of aluminum railings and hurricane protection products.

² In her denial, the director also examined issues of whether the beneficiary was self-employed prior to working for the petitioner, whether the petitioner was a successor in interest to a previous petitioner before the priority date, and the payroll payment practices of various companies for which the beneficiary apparently worked. The AAO does not view these issues as relevant to the petition and will not address these issues further.

³ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. Department of Labor. See 8 CFR § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the Form ETA 750 was accepted on June 6, 2003. The proffered wage as stated on the Form ETA 750 is \$59,320 annually.

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the petition submitted to CIS during the second quarter of 2004, the petitioner claimed to have been established in 2002, to have a gross annual income of \$6,156,482, and to currently employ 86 workers. The petitioner submitted a letter from [REDACTED], President, dated June 17, 2004 that stated the petitioner was a privately owned company with gross sales in 2003 of over six million dollars, and that the petitioner employed at least 102 employees. With regard to its ability to pay the proffered wage, the petitioner submitted an unaudited Annual Income Statement for Fiscal 2003.

The director in a notice of intent to deny stated that the conflicting numbers of employees stated by the petitioner either in the letter of support or on the petition, required that the petitioner submit all pages its 2003 income tax return with corresponding W-2 forms. In response, the petitioner submitted a letter from its Chief Financial officer [REDACTED] dated February 17, 2005 that explained the petitioner had taken over the assets of another company and hired its employees. [REDACTED] stated that although the petitioner could have stated it had 86 employees in 2002, the number of employees as of the writing of the petition was 102 and currently was 105. [REDACTED] also stated that these employees are individuals on the petitioner's payroll as well as subcontractors.

In response to the director's NOID, the petitioner also submitted Forms 941, Employer's Quarterly Federal Tax Return, for all four quarters of tax year 2003, that indicated the petitioner had an average of 17 employees in 2003, as well as Forms 941 for all four quarters of tax year 2004 that indicated the petitioner had an average of 80 employees during this period of time. The petitioner also submitted its 2004 state of Florida Quarterly Wage Reports with accompanying lists of wages paid to individuals. The petitioner's employee list for the state of Florida Quarterly Wage Report for the third quarter, which encompasses the July 17, 2004 receipt date for the filing of the instant petition, identifies 88 employees.

In her decision to deny the petition, the director noted that the evidence submitted to record did not establish that the petitioner had over 100 employees as of the priority date, and therefore the petitioner could not establish its ability to pay the proffered wage based on a statement from its chief financial officer. The director also stated that the petitioner still had not submitted its tax returns for the 2003 priority year and onward.

On appeal, counsel notes that with regard to the number of the petitioner's employees for tax years 2003 and 2004, the petitioner submitted 101 W-2 forms for tax year 2003 and 146 W-2 forms for tax year 2004. Counsel also noted that the petitioner's wages and taxes documentation previously submitted to the record indicated \$1.1 million in wages in tax year 2003 and \$2.8 million in wages in tax year 2004. Counsel states that although the petitioner did not submit copies of the actual 2003 corporate tax return, it did submit credible evidence of its financial status and the actual number of employees.

Subsequent to the appeal, on May 27, 2006, counsel submitted further supporting evidence that was unavailable at the time the original appeal was filed. Counsel submits the following documents:

A Consolidated Summary Rolling Budget for the corporate tax year ending March 2006;

Form 1120, U.S. Corporation Income Tax Return, for 2004 that indicates net income of - \$1,618,804 and net current assets of -\$1,571,207;

State of Florida Corporate Income Tax Returns for tax years 2003 and 2004 that indicate federal taxable income of -\$2,806.031 in tax year 2003 and -\$1,618,804 in tax year 2004.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, Citizenship and Immigration Services (CIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

As noted previously, the petitioner submitted state of Florida documentation as well as IRS Form 941 forms that indicated it did not have 100 employees as of the date the petition was filed, namely, July 15, 2004. Furthermore the petitioner's W-2 forms for tax year 2003 only identify 99 employees.⁴ Thus, the petitioner, based on its state of Florida salary and tax documentation and its IRS Forms 941, does not appear to have established that it had over 100 employees at the time it submitted the I-140 petition. Although counsel on appeal asserts that the petitioner filed 101 W-2 forms in tax year 2003, the AAO calculates the petitioner filed 99 W-2 forms.⁵ The petitioner will be obliged, pursuant to 8 C.F.R. § 204.5(g)(2), to demonstrate its ability to pay the proffered wage with copies of annual reports, federal tax returns, or audited financial statements.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner submitted either W-2 Forms or Form 1099-MISC to establish the wages paid to the beneficiary during tax years 2003 and 2004. These documents indicate that, as correctly noted by the director, the beneficiary earned \$4,510.18 in wages and \$32,767.32 in nonemployee compensation. The beneficiary's entire compensation from the petitioner was \$37,277.50 in tax year 2003. In tax year 2004, the petitioner paid

⁴ These state of Florida documents, as well as the Forms 941 do reflect increasing wages during both the 2003 and the 2004 tax years. The reported wages for the first quarter of 2003 are \$130,391, while the fourth quarter wages for tax year 2003 are \$670,306. The AAO will comment on this factor more fully further in these proceedings.

⁵ The confusion in actual number of W-2 forms may be caused by the petitioner calculating the first page of W-2 Forms as two additional forms, when in actuality the first page identifies the grand total of wages paid in tax year 2003, namely, \$1,132,333.11. Although the first page has two W-2 forms on it, they are not used to identify any individual employee's wages.

the beneficiary \$31,241, based on a W-2 Form submitted to the record. Although the petitioner established that it employed the beneficiary as of the 2003 priority date and paid him wages, the petitioner has not established that it employed and paid the beneficiary the full proffered wage from the 2003 priority date. Thus, the petitioner has to establish its ability to pay the difference between the beneficiary's actual wages and the proffered wage, namely, \$22,042.50 in the priority date year 2003, and \$28,078.14 in tax year 2004.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine the net income figure reflected on the petitioner's federal income tax return. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. The court in *Chi-Feng Chang* further noted:

Plaintiffs also contend the depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. See *Elatos*, 632 F. Supp. at 1054. [CIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support.

(Emphasis in original.) *Chi-Feng* at 537.

As stated previously, the petitioner is structured as a corporation. The petitioner's 2003 and 2004 tax returns demonstrate the following financial information concerning the petitioner's ability to pay the difference between the wages paid to the beneficiary and the proffered wage from the priority date:

In 2003, as stated previously, the petitioner's state of Florida corporate tax return indicated federal taxable income of -\$2,806,031.

In 2004, the Form 1120 stated a net income⁶ of -\$1,618,804.

Therefore, for the years 2003 and 2004, the petitioner did not have sufficient net income to pay the difference between the beneficiary's actual wages and the proffered wage, namely, \$22,042.50 in the priority date year 2003, and \$28,078.14 in tax year 2004.

⁶The AAO identifies the petitioner's net income as the figure for taxable income before net operating loss deduction and special deductions, as reported on Line 28 of the Form 1120.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider net current assets as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.⁷ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. As noted previously, the petitioner did not submit its Federal income tax return for 2003, although it did submit state of Florida corporate income tax return for 2003 that identified the petitioner's federal taxable income. However, since the petitioner did not submit its 2003 federal income tax return, the AAO cannot calculate the petitioner's net current assets based on figures contained on the petitioner's Schedule L for tax year 2003.⁸ Therefore the AAO will only examine the petitioner's federal income tax return for tax year 2004. The petitioner's net current assets during 2004 were -\$1,571,207.

Therefore, for the years 2003 and 2004, the petitioner did not have sufficient net current assets to pay the proffered wage.

Therefore, from the date the Form ETA 750 was accepted for processing by the U. S. Department of Labor, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

On appeal, counsel draws attention to the documentation submitted by the petitioner with regard to number of employees paid by the petitioner and the fact that the petitioner's wages continue to rise, more than doubling in tax year 2004 from \$1.1 million to \$2.8 million. The AAO views the documentation of the petitioner's wages as a positive factor, when considering the totality of the petitioner's circumstances, as outlined in *Matter of Sonogawa*,¹² I&N Dec. 612 (BIA 1967). *Sonogawa* relates to petitions filed during uncharacteristically unprofitable or difficult years but only in a framework of profitable or successful years. The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional

⁷According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

⁸ The petitioner also provided no further explanation for why it was able to submit its 2004 federal income tax return, while it was unable to submit its 2003 federal income tax return.

Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

No unusual circumstances have been shown to exist in this case to parallel those in *Sonegawa*, nor has it been established that 2003 was an uncharacteristically unprofitable year for the petitioner. Based on the evidence on the record, both 2003 and 2004 were unprofitable years for the petitioner. It is also noted that the instant petitioner was established in 2002, while the petitioner in *Sonegawa* had been in business for eleven years.

Nevertheless, the petitioner has generated significant increases in both business operations and wages since its inception. Furthermore, while the 2004 tax return submitted to the record documents negative net income and net current assets, it also documents \$215,000 in officer compensation which is viewed as a discretionary expense available to pay the difference between the beneficiary's actual wages and the proffered wage, if the primary shareholder/officer were both willing and able to use such compensation to make up the difference between actual wages and the proffered wage. Although CIS will not consider gross income without also considering the expenses that were incurred to generate that income, the overall magnitude of the entity's business activities should be considered when the entity's ability to pay is in question. See *Sonegawa*. In tax year 2004, based on credible evidence submitted on appeal, the petitioner employed over one hundred employees, had \$8,098,200 in gross receipts/sales, and paid salaries and wages of over \$684,334.

With regard to negative factors, the history of the companies in the area in which the petitioner operates as documented by the petitioner's letter of support submitted in response to the director's request for further evidence can be viewed as either volatile or lucrative. [REDACTED] and [REDACTED] both describe a series of companies, such as Safeguard Hurricane, for which the beneficiary worked prior to its being bought or acquired apparently by a private group of investors. While weighing the historic viability of companies involved in hurricane protection services or products, the AAO also weighs the fact that the instant petitioner has continued to increase its workforce and wages consistently since its establishment, has significant gross receipts/sales, a large work force with substantial wages and benefits paid, and that the need for hurricane protection services or products in Florida most likely will not diminish with time. As in *Sonegawa*, the overall circumstances of the instant petitioner support the petitioner's business viability and its ability to pay the difference between the beneficiary's wages and the proffered wage as of the 2003 priority date and onward. The petitioner has established its ability to pay the difference between the beneficiary's actual wages and the proffered wage as of the 2003 priority date and onward.

Thus the director's decision with regard to the petitioner's ability to pay the proffered wage as of the 2003 priority date and the present date is withdrawn.

The AAO will now consider whether the petitioner has established that the beneficiary is qualified to perform the duties of the proffered position. Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

The petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the Form ETA 750 was accepted on June 6, 2003.

The AAO takes a *de novo* look at issues raised in the denial of this petition. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal⁹. On appeal, counsel asserts that based on the letters of work verification from Colombia the beneficiary has the requisite four years of work experience prior to the 2003 priority date and the petition should be approved.

To determine whether a beneficiary is eligible for an employment based immigrant visa, Citizenship and Immigration Services (CIS) must examine whether the alien's credentials meet the requirements set forth in the labor certification. In evaluating the beneficiary's qualifications, CIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. CIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also, Mandany v. Smith*, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

In the instant case, the Application for Alien Employment Certification, Form ETA-750A, items 14 and 15, set forth the minimum education, training, and experience that an applicant must have for the position of marketing representative. In the instant case, item 14 describes the requirements of the proffered position as follows:

- | | |
|-------------------------|-------|
| 14. Education | |
| Grade School | blank |
| High School | blank |
| College | blank |
| College Degree Required | blank |
| Major Field of Study | blank |

The applicant must also have four years of experience in the job offered, the duties of which are delineated at Item 13 of the Form ETA 750A and since this is a public record, will not be recited in this decision. Item 15 of Form ETA 750A does not reflect any special requirements.

The beneficiary set forth his credentials on Form ETA-750B and signed his name under a declaration that the contents of the form are true and correct under the penalty of perjury. On Part 15, eliciting information of the beneficiary's work experience, he represented that he had worked self-employed fulltime from May 2002 to the time he signed the Form ETA 750, Part B, and that he worked fulltime for Safeguard Hurricane Protection, Boynton Beach, Florida from April 2000 to April 2002 as a sales and marketing consultant. He also claimed that he had worked fulltime for [REDACTED], in Cali, Colombia, as a marketing representative

⁹ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

from July 1985 to July 1989. The beneficiary does not provide any additional information concerning his employment background on that form.

The record of proceeding also contains a Form G-325, Biographic Information sheet submitted in connection with the beneficiary's application to adjust status to lawful permanent resident status. On that form under a section eliciting information about the beneficiary's last occupation abroad, the beneficiary reiterated the information contained on the ETA 750.

With the petition, the petitioner submitted two letters of work experience, one from [redacted] Shop Manager, Safeguard Hurricane Protection, Boynton Beach, Florida, and the second letter from [redacted] and [redacted] Cali, Colombia. The letters both supported the beneficiary's claims of employment in Colombia and in the United States prior to the 2003 priority date.

In a subsequent notice to deny the petition, and the subsequent denial of the petition, the director questioned the documentation of the beneficiary's employment in the United States, and the dates of his self-employment or employment with various companies that were either dissolved or bought out by other companies. The director also requested a second letter of work verification from [redacted] in Colombia to explain how the beneficiary worked fulltime for the company and also attended college. [redacted] responded with a detailed letter that explained the beneficiary worked for his company from July 1, 1985 to July 31, 1989 fulltime. [redacted] also had attended classes during his employment with the company, but had only attended on an occasional or part time basis and that the beneficiary did not complete his degree.

In his denial of the petition, the director examined [redacted] letter and stated:

The translated affidavit from [redacted] submitted in the response satisfied this office [that] the beneficiary worked fulltime while attending university from 1976 to 1986. This office was remiss in not noting no degree was ever obtained by the beneficiary in this time, and the H1B status was therefore based on a mixture of education and/or experience

In her denial, the director cited inconsistencies in information pertaining to the beneficiary's employment experience in the United States prior to the filing of the labor certification, and determined that the director's prior invalidation of the beneficiary's ETA 750 would stand. The director cited 20 C.F. R. 656.30(d), that states a labor certification issued by the Department of Labor was subject to invalidation by legacy INS or the Department of State only upon a finding of fraud or willful misrepresentation of a material fact involving the labor certification applications. The director also cited *Matter of Patel*, 16 I&N Dec. 444, Int. Dec. (BIA) 2632 (1978).

On appeal, counsel states that the notarized statement by [redacted] states that the beneficiary worked fulltime as a marketing representative in Colombia for four years and one month prior to his entry in the United States. Counsel states that the beneficiary's ETA 750 should not have been invalidated and that neither the petitioner nor the beneficiary ever sought to establish the requisite work experience based on employers other than the Colombian company. Counsel states that the petitioner has established that the beneficiary has the requisite four years of work experience prior to the 2003 priority date and the petition should be approved.

The regulation at 8 C.F.R. § 204.5(1)(3) provides:

(ii) *Other documentation—*

(A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

(B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

The AAO finds the director's evaluation of the second letter submitted by [REDACTED] be imprecise. While the director states that this second letter establishes that the beneficiary worked fulltime for ten years in Colombia from 1976 to 1986, the letter does not address the beneficiary's work history prior to his employment with [REDACTED]. The letter responds to the director's request for further evidence to support the beneficiary's claim that he worked fulltime for [REDACTED] from July 1985 to July 1989. Upon review of the letter, the letter writer both answers the director's request for further clarification of the beneficiary's fulltime or part time work status during his employment from 1985 to 1989, and clarifies more specifically the beneficiary's claimed employment dates, July 1, 1985 to July 31, 1989. The AAO finds the letter to be sufficient evidence to establish the beneficiary's requisite four years of relevant work experience as a marketing representative. See 8 C.F.R. § 204.5(l)(3)(ii).

The AAO further acknowledges that the regulations require the petitioner to establish that the beneficiary has the requisite four years of relevant work experience prior to the priority year 2003, irrespective of whether the experience was obtained in the United States or elsewhere. Although the petitioner did submit a letter of work verification from the beneficiary's U.S. employer to the record to further substantiate the beneficiary's work experience, the director's analysis of the beneficiary's **employment history and employment status is unnecessary.** As stated previously, the AAO views the letter from [REDACTED] in particular, the second letter that specifically discussed the beneficiary's fulltime work status while attending college on a sporadic basis, to be sufficient to establish the beneficiary's qualifications as stipulated on the Form ETA 750. Furthermore, the AAO, pursuant to 20 C.F.R. § 656.30(d), does not find any fraud or willful misrepresentation of a material fact involving the labor certification application.

Therefore the director's decision with regard to the invalidation of the Form ETA 750 and the beneficiary's qualifications is withdrawn. The petitioner has established that the beneficiary has the requisite four years of relevant work experience.

Thus the petitioner has established that it has the ability to pay the proffered wage as of the 2003 priority date and to the present. It also has established that the beneficiary is qualified to perform the duties of the proffered position. The appeal is sustained. The petition will be approved.

Order: The appeal is sustained. The petition is approved.